

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM BEAUFORT COUNTY S.C. SUPREME COURT  
Court of Common Pleas  
The Honorable Marvin H. Dukes, III, Master In Equity

Opinion Number 5646  
South Carolina Court of Appeals  
Appellate Case No. 2019-001201  
Heard April 12, 2018 – Filed May 8, 2019

Grays Hill Baptist Church,

Petitioner,

v.

Beaufort County and the Beaufort County Zoning Board of Appeals, Defendants,

And

The United States of America,

Defendant-Intervenor,

Of Which Beaufort County and The United States of America are Respondents.

RESPONDENT'S BRIEF

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## **QUESTIONS PRESENTED**

- I. DID THE SOUTH CAROLINA COURT OF APPEALS CORRECTLY FIND THAT THE CHURCH WAS REQUIRED TO APPLY FOR A NEW DEVELOPMENT PERMIT IN ORDER TO BUILD THE FELLOWSHIP HALL?
  
- II. DID THE SOUTH CAROLINA COURT OF APPEALS CORRECTLY FIND THAT THE EXPANSION REQUESTED BY THE CHURCH WAS PROHIBITED UNDER THE CURRENT ZONING AS IT WOULD INCREASE THE OCCUPANT LOAD OF THE SITE?

## **PROCEDURAL HISTORY**

This matter initially came before the Court pursuant to two appeals, which had been consolidated by consent of the parties. The first appeal, formerly Case Number 08-CP-07-1114 and now Case Number 12-CP-07-1394, was commenced by the filing of the Plaintiff on April 3, 2008. Appeal was taken from the decision of the Beaufort County Planning Commission denying Grays Hill Baptist Church's (hereinafter "the Church") request for a development permit to construct a Fellowship Hall. Following a hearing on this appeal, by consent the trial court stayed this appeal originally while the Church applied for a variance related to the construction of the same fellowship hall. The Beaufort County Board of Zoning Appeals denied the Church's application for a variance finding that it did not meet the minimum requirements for a variance under the relevant ordinance. A Summons and Complaint-Petition was filed by the Plaintiff on October 4, 2010, and was assigned Case Number, 10-CP-07-4844.

The United States of America moved to intervene, on behalf of the Marine Corps Air Station Beaufort, South Carolina (hereinafter "Air Station") and opposed the Church's application to build a secondary structure to be used as a sanctuary/fellowship hall on the site at 2749 Trask Parkway, Beaufort, SC 29906. The motion to intervene was granted by order dated June 30, 2011.

This matter went before the Circuit Court pursuant to the consolidated appeals. In a hearing on both appeals held on July 25, 2011, the Circuit Court ordered that the DRT's decision to deny the permit request be remanded back to the Planning Commission with instructions to rehear the appeal de novo as the

current record was insufficient to be ruled upon. The Court left open the question of the propriety of the variance for a later determination if necessary.

The Planning Commission reheard the appeal of the permit application request for the Fellowship Hall de novo on December 5, 2011. Following argument and testimonies by the parties, the Commission voted to deny the permit. **[Record on Appeal, pp. 239-242]**

The Church appealed this decision to the Court of Common Pleas; and the trial court heard argument on both appeals on October 23, 2012. The court ruled on both appeals on March 19, 2013, finding that in case number 12-CP-07-1394 the decision of the Beaufort County Planning Commission be reversed and Beaufort County be directed to allow the Grays Hill Baptist Church to conclude the development of its property and proceed with the construction of its Fellowship Hall as depicted on the development plat. Additionally, the Court ruled that Case 2008-CP-07-114 and 2010-CP-07-4844 shall be dismissed as they are rendered moot by the decision in case Number 12-CP-07-1394. Beaufort County moved to reconsider that order and following an extended period while the United States and the Church attempted to resolve this matter. By order filed February 29, 2016, the court denied the motion for reconsideration. The County and the USA appealed to the South Carolina Court of Appeals. On May 8, 2019, the Court of Appeals reversed the trial court finding that a new development permit was properly required by the County, that the new zoning of the Church prohibited the desired fellowship hall as it increased the occupant load of the site. Additionally the Court found that the variance requested by the

Church was properly denied. In its brief, the Church asserts error in the first two findings by the Court of Appeals, but has abandoned its appeal as it relates to the variance application.

### **STATEMENT OF FACTS**

Petitioners began construction in 1997 on the church and supporting infrastructure. The original site plans submitted to the County with its development permit application included both a church and an adjoining proposed sanctuary/fellowship hall. However, when Petitioner applied to the County for the development permit, they applied only for permission to develop the church and surrounding parking facilities. The master plan ultimately approved by the County indicates that the Church was designated as "Phase I" and the adjoining fellowship hall was designated as "Phase II" and would therefore be completed separately from the church. Development under this permit of the church and surrounding infrastructure was completed in 1997, and at the end of that same year the County issued a final inspection certificate of compliance that effectively closed out the development permit.

On December 11, 2006, Beaufort County adopted the Airport Overlay District. The Airport Overlay District includes all lands underlying the noise zones of 65 decibels and above, and all accident potential zones as designated in the most recent Air Installations Compatible Use Zones (AICUZ) Report as determined by the Department of the Navy, and as adopted by the Beaufort County Council. The Petitioner's property is located in the Accident Potential Zone-2 (APZ-2) which has a "measurable potential for an aircraft accident."

Accident Potential Zones are based upon statistical analyses of past Department of Defense (DOD) aircraft accidents. APZs consist of a clear zone (CZ), APZ I, and APZ II. The CZ, the area closest to the runway end, is the most potentially hazardous. APZ I is an area beyond the CZ that possesses a significant potential for accidents. APZ II is an area beyond APZ I having a lower, but still significant, potential for accidents.

Under the guidelines of the District, the Church became a "nonconforming place of assembly and worship," which limited its expansion to 15%. Due to questions as to whether the expansion limitation was 15% of the total disturbed area of the church complex, or 15% of the current square footage constituting the church building, Beaufort County amended its ordinance on February 25th, 2008 to clarify that the limitation was to a 15% expansion of the building only.

In 2007, the Church submitted an application to build a new sanctuary/fellowship hall next to their Church which is the subject of this appeal. On October 17th, 2007, Beaufort County's Development Review Team denied the Petitioner's request to construct the sanctuary/fellowship hall by unanimous vote, specifically noting the safety hazard of having increased numbers of people meeting at a centralized location (occupancy load) and the additional times people would congregate at the subject location.

On November 6th, 2007, the Church appealed to the Planning Commission and again was denied permission to construct the sanctuary/fellowship hall. The Church then appealed the Planning Commission's denial to the Circuit Court. After an initial hearing on the matter, the Court agreed

to stay the case while the Church requested a variance from Beaufort County to build the fellowship hall. On July 22, 2010 the Beaufort County Zoning Board of Appeals denied the Church's request for a variance. The Church summarily appealed the denial of the variance to the Circuit Court as well.

This matter went before the Circuit Court pursuant to the two appeals, which were consolidated by consent of the parties. In a hearing held on July 25, 2011, the circuit court ordered that the DRT's decision to deny the permit request be remanded back to the Planning Commission with instructions to rehear the appeal de novo as the current record was insufficient to be ruled upon. The court left open the question of the propriety of the variance for a later determination if necessary.

This matter was reheard before the Planning Commission. The Commission heard argument from Counsel and testimony on this matter de novo on December 5, 2011. The Planning Commission determined that the DRT was correct in denying the permit application because the site expansion requested in the permit would have been an unlawful increase in occupant load contrary to the limitation set forth in Appendix A1 Section 7(a)(6).

Appendix A1 Section 7(a)(6) as it existed at the time of the petition provided that

“....nonconforming places of assembly and worship shall be permitted to be rebuilt if damaged greater than 50 percent of their market value provided that the noise attenuation requirements of section 6 are met. Nonconforming places of assembly and worship may be expanded up to 15 percent in accordance with table 106-9 provided the expansion does not increase the occupant load of the building.”

Table 106-9 provides for expansion with regard to “Uses” that “15 percent disturbed area expansion [is] allowed within required setbacks and with maximum feasible buffers.” Likewise, in the context of buildings and structures, Table 106-9 provides that “[e]xpansions of up to 15 percent are allowed provided setbacks are not reduced and maximum feasible landscaping and buffers are used.”

### **STANDARD OF REVIEW**

The findings of fact by a County Zoning or Planning Board shall be treated in the same manner as findings of fact by a jury, and the court may not take additional evidence. S.C.Code Ann. § 6-29-840(A) (Supp.2003); see also Heilker v. Zoning Bd. of Appeals for City of Beaufort, 346 S.C. 401, 405, 552 S.E.2d 42, 44 (Ct.App.2001). In reviewing the questions presented by the appeal, the court shall determine only whether the decision of the Board is correct as a matter of law. Id. Furthermore, “[a] court will refrain from substituting its judgment for that of the reviewing body, even if it disagrees with the decision.” Restaurant Row Assocs. v. Horry County, 335 S.C. 209, 216, 516 S.E.2d 442, 446 (1999). A decision of a zoning board will only be overturned if it is “arbitrary, capricious, has no reasonable relation to a lawful purpose, or if the board has abused its discretion.” Id.

## ARGUMENT

1. The Court of Appeals correctly found that the Church was required to seek a new development permit in 2007 to construct the second phase of its development as the initial development permit expressly covered only the initial phase of the development.

The initial basis of the Church's Appeal is that the original Development Permit issued to the Church in 1997 allowed a "unified single comprehensive development" because the Fellowship Hall is clearly shown on the development plat. The Church further argues that there is no basis in fact to support the Court of Appeals finding that the Development was divided into phases. This argument is a complete fabrication and ignores the documents which are in the record of this matter and the basis upon which the original development permit was issued.

Based on the clear terms of the Church's development permit application from 1997, the Church only sought a development permit for a 15,872 sq. foot building. **[Record on Appeal, pp. 244, 245]** This permit request was made ten (10) years prior to the permits that were requested in 2007 and are at issue in this matter. Furthermore, all development which was requested in the initial development permit was completed by 1997. **[Record on Appeal, p. 248]**

The Narrative that was the descriptive basis of the Church's 1997 Development Permit Application clearly divides the project into phases. Phase I was a 15,872 sq. ft. church with 25,150 sq.ft. asphalt and concrete paving. Phase II of the development is described in the Narrative to "consist of a 11,250 sq. ft. building shown on the enclosed plans as the building south of the church." **[Record on Appeal, p. 245]** The application for the development permit itself

only requests to develop the "Phase I" building and references specifically 15,872 sq. ft. to be built – which is the size of the original, Phase I Church building. **[Record on Appeal, pp. 244, 245]** Also, it is important to point out that the County issued a final inspection certificate of compliance for Phase I that effectively closed out this development permit in December of 1997. **[Record on Appeal, p. 248]** The import of the issuance of this certificate of compliance is that it indicates that all approved development from the permit had been completed. Contrary to the Church's argument, there is no evidence that would support the continued validity or vested right in the subject 1997 development permit as alleged by the Church.

Moreover, this issue has previously been addressed by our Courts in the context of a vested rights determination when dealing with a project that is divided into phases. In F.B.R. Investors v. County of Charleston, the Court of Appeals held that a Developer did not have vested right to continue construction of multifamily project on property, even though it had completed part of project before County downzoned property to single-family status, where Developer chose to divide its project into two phases, where second phase was essentially barren land when downzoning took effect, where no construction had begun on second phase at time of zoning change, and where developer had not yet obtained building permits to complete construction. F.B.R. Investors v. County of Charleston, 303 S.C. 524, 525, 402 S.E.2d 189, 190) (Ct.App. 1991). Such is this case before the court, thus there is no "vested right" to a second phase of a project where no construction had begun on the second phase at time of zoning

change, and where developer had not yet obtained building permits to complete construction for the second phase of its development.

While certainly, the Church could have submitted its application for the complete project without phasing, it for whatever reason chose not to do so. Any argument that this was not a phased project is disingenuous at best. The phased nature of this project is clearly evidenced by the square footage reference and project narrative in the Development Permit application. **[Record on Appeal, pp. 244, 245]**. Based on the evidence in the record, it is clear that the development sought and approved by the county in 1997 did not include the 11,250 sq. ft. fellowship hall indicated as part of Phase II on the site plans.

2. The Court of Appeals correctly found that the site expansion requested by the Church was prohibited under the current zoning as there was evidence in the record that such expansion would increase the occupant load of the site.

The Church asserts that the Court of Appeals erred in upholding the finding of the DRT and Planning Commission denying the new Development Permit. It contends that it was error to find that the expansion sought for the now nonconforming place of assembly would increase the occupant load of the building, and therefore, expansion was expressly prohibited.

The Court of Appeals determined that the DRT and Planning Commission decision to deny the permit application was supported by evidence in the record because there was evidence in the record to support that the site expansion requested in the permit would have been an unlawful increase in occupant load contrary to the limitation set forth in Appendix A1 Section 7(a)(6).

Appendix A1 Section 7(a)(6) as it existed at the time of the petition provided that

“...nonconforming places of assembly and worship shall be permitted to be rebuilt if damaged greater than 50 percent of their market value provided that the noise attenuation requirements of section 6 are met. Nonconforming places of assembly and worship may be expanded up to 15 percent in accordance with table 106-9 provided the expansion does not increase the occupant load of the building.”

(emphasis added). Table 106-9 provides for Expansion with regard to “Uses” by saying that “15 percent disturbed area expansion [is] allowed within required setbacks and with maximum feasible buffers.” Likewise it provides for “Buildings and structures” expansion that “[e]xpansions of up to 15 percent are allowed provided setbacks are not reduced and maximum feasible landscaping and buffers are used.”

There is no question that the Church is “a nonconforming place of assembly” under the new zoning ordinance. Additionally, it is clear that expansion of up to fifteen percent of the total area is permissible if the expansion did not increase the occupancy load. The Church maintains that the fellowship hall will have no impact on occupancy in practice because the facilities will be occupied alternatively, a representation that is impossible to enforce or monitor. The Court of Appeals agreed with the County that, conversely, the construction of an additional 10,000 sq. ft. building would increase the occupiable space on this site. While it is admitted by the County that the term “occupant load” is not defined directly anywhere in the County ordinance, the County has adopted the International Fire Code by reference and has incorporated this Code into the

County Ordinances. See Beaufort County Ordinance Section 74-64. The International Fire Code specifically defines “occupant load” as the number of persons for which the means of egress of a building or portion thereof is designed. The Code further goes on to set forth the means of mathematically calculating the occupant load of a building based upon its intended use.

The County provided the testimony at the Planning Commission hearing in December 5, 2011, of Tim Ogden, Beaufort County Fire Marshall, with regard to the application of the calculation to the site. **[Record on Appeal, pp. 170, 171]** Mr. Ogden testified that the site’s current occupant load for the church building is 293. He further testified that the structure applied for in the permit would have a minimum occupant load of 533, thereby nearly doubling the occupant load for the site. He additionally testified that when calculating occupant load, it is the potential for how many people can occupy the space that is considered, as opposed to representations as to how many people will actually occupy the building. In summary, and for purposes of this analysis, “occupant load” is a term of art that is mathematical calculation of the number of person authorized to safely occupy a site based upon the square footage and use of the building.

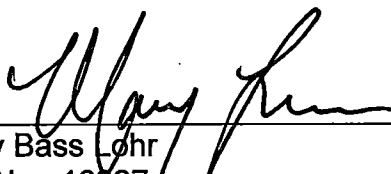
It is clear that there is evidence in the record that the calculation of the occupant load of the structure as requested in the permit would nearly double what the current load is, and the site expansion requested in the permit would violate the prohibitions set forth in Appendix A1 Section 7(a)(6). Based on the foregoing, the permit for the Fellowship Hall expansion to the Grays Hill Baptist

Church was properly denied by the Court of Appeals when it reversed the trial court.

**CONCLUSION**

Based on the evidence in the record, the Court of Appeals correctly found that the Church was required to seek a new development permit for the fellowship hall, and that there was evidence to support the Planning Commission's finding that the addition of the fellowship hall would increase the occupancy load of the site. Additionally, Petitioner's appeal should be dismissed for failure to comply with the South Carolina Appellate Court Rules.

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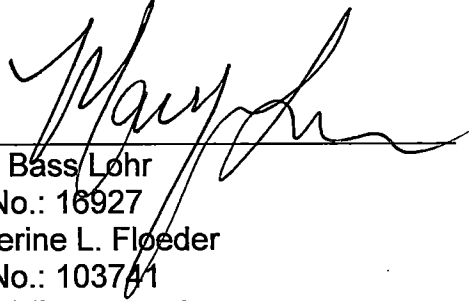
The undersigned counsel hereby certifies that she has served the foregoing Respondent's Brief upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on the 12<sup>th</sup> day of December, 2019 addressed to the following:

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